

**IN THE HIGH COURT OF ZAMBIA
FAMILY AND CHILDREN'S COURT DIVISION**
(Civil Jurisdiction)

2022/HPF/366

B E T W E E N:

IN THE MATTER OF:

**AN APPLICATION FOR THE RESPONDENT TO
RENDER AN ACCOUNT OF THE ESTATE OF
THE LATE AUGUSTINE MKANDAWIRE**

IN THE MATTER OF:

**SECTIONS 5, 6, 14, 15 AND 19 OF THE
INTESTATE SUCCESSION ACTT, CAP 59 OF
THE LAWS OF ZAMBIA.**

BWTWEEN:

JAMES NYASULU

(suing in his capacity as administrator of the late Augustine Mkandawire)

APPLICANT

AND

ANNA PHIRI

(sued in her capacity as widow and intermeddler in the estate late Augustine Mkandawire)

1ST RESPONDENT

ESTHER PHIRI

(sued as an intermeddler in the estate of the late Augustine Mkandawire)

2ND RESPONDENT

INDO-ZAMBIA BANK LIMITED

(sued as intermeddler in the estate of the late Augustine Mkandawire)

3RD RESPONDENT

Before the Hon. Mrs. Justice M.M. Bah-Matandala

On the 30th April, 2024.

For the Applicant: Mr. J.K. Matende- Messrs Legal Aid Board

For the 1st Respondent: In Person

For the 2nd Respondent: In person

For the 3rd Respondent: Mr. S. Kapampa Messrs. in house counsel

J U D G E M E N T

LEGISLATION REFERRED TO:

1. *The Intestate Succession Act Chapter 59 of the laws of Zambia.*
2. *The Co-operative Societies Act No. 20 of 1998*

1.0 INTRODUCTION

1.1 By way of Originating Summons supported by an Affidavit dated 21st July 2022 the Applicant sought the following:

- 1) *An Order of interim injunction restraining the Respondents whether by themselves, servants, agents or whomsoever from performing or acting as the administrator or in any way intermeddling in the estate of the late Augustine Mkandawire until further Order of court;*
- 2) *That the Respondents delivers up properties, all documents and personal belongings for the deceased including vehicles, title deeds, keys and receipts and all other valuables;*
- 3) *That the Respondents renders an account and produce an inventory of all personal property,*

including, money belonging to the deceased that came into her hands;

4) That this Honourable Court makes a declaration that the bank allows dully appointed Administrators access to PAEB account at Indo-Zambia Bank Manda hill Branch;

5) Any further relief the Court may deem fit;

6) Costs.

2.0 AFFIDAVIT IN SUPPORT OF THE APPLICATION

2.1 In the Affidavit in Support dated 21st July 2022 and deposed to by **James Nyasulu** in his capacity as one of the Administrators in the Estate of the late Augustine Mkandawire, he deposed that the deceased and the 1st Respondent were married in year 2012 and did not have any child of the marriage but had children from their earlier marriages.

2.2 It was further deposed that following this Court's grant of Letters of Administration to the Applicant and the deceased's daughter, the Respondents have refused to hand over property of the Estate in their custody.

- 2.3 Further that there was money amounting to ZMW1, 300,000.00 which was paid to the Deceased's account three months after his death from United Nations Development Programme (UNDP) as balance of his payment upon successful completion of the project he had with UNDP; which money was withdrawn by the 2nd Respondent from Indo Zambia Bank Manda Hill branch when she was not a signatory to the account and had no authority under the estate.
- 2.4 It was further averred that the Deceased purchased land in Lundazi in the Eastern Province for the family but the 2nd Respondent denied that the said land was purchased. Also, that there was a balance of ZMW13, 000.00 to be paid to the Estate of the Deceased on the contract the Deceased had with Electoral Commission of Zambia.
- 2.5 It was further deposed that the Respondents have continued to use the two vehicles belonging to the Estate which they have refused to hand over.
- 2.6 It was averred that the Respondents account for ZMW 1,300,000.00 withdrawal from Indo Zambia Bank,

K144,000.00 of K400.00 per day by 30 days by 12 months for the use of the Mitsubishi Canter, ZMW13, 000.00 balance for the hire of the Mitsubishi Canter by Electoral Commission of Zambia and ZMW 17,000.00 money used to buy a farm in Lundazi in the Eastern Province.

3.0 AFFIDAVIT IN OPPOSITION TO THE APPLICATION

- 3.1 In the Affidavit in Opposition for the 3rd Respondent, it was averred that the Applicant, Mr. Edward Situmbeko and Justine Situmbeko are active signatories of the Policy Analysis and Evaluation Bureau (PAEB) save for Mr. Justine Mkandawire who is now deceased.
- 3.2 It was deposed that the 3rd Respondent acknowledged having been informed of the demise of the deceased herein.
- 3.3 It was also averred that the 2nd Respondent made an over the counter withdrawal of funds from the PAEB account at the 3rd Respondent.
- 3.4 Further that there was a Board Resolution which resolved that Mr. Edward Situmbeko and Justine Situmbeko, the Applicant be maintained as board members and

signatories with the 2nd Respondent as an alternate signatory.

3.5 The 3rd Respondent denied ever having intermeddled in the estate of the 3rd Respondent. The 3rd Respondent also denied having allowed an illegal withdrawal of funds by the 1st and 2nd Respondents.

4.0 **AFFIDAVIT IN REPLY**

4.1 In Reply it was averred by the Applicant that the signatories namely; James Nyasulu, Edward Situmbeko and Justine Situmbeko as acknowledged by the 3rd Respondent were active signatories of the PAEB account, they were also serving as board member, Chairman, Treasurer and Secretary of PAEB respectively.

4.2 It was further averred that the 3rd Respondent was informed by the Respondents and the Applicant about the demise of the Deceased hence the bank withdrawal made by the 2nd Respondent was done with the full knowledge of the 3rd Respondent but never made efforts to inform the Administrators.

5.0 **SKELETON ARGUMENTS IN SUPPORT OF APPLICATION**

5.1 In the Skeleton Arguments in Support of Originating Summons, it was submitted that despite the law giving power to the Administrator to be in charge of all the deceased estate, the Respondents have not allowed the Administrators to take charge of the Estate. Reference was made to **Section 5 and 24 of the Intestate Succession Act Chapter** on the manner in which the property of the intestate ought to be shared and on the duties of the administrator respectively.

5.2 It was further submitted that the Respondents, by holding on to the estate of the deceased as though they were dully appointed administrators was not only illegal but also a clear disrespect of the Court. Reference was made to **section 6 of the Administrator Generals Act Chapter58 of the Laws of Zambia.**

6.0 **HEARING**

6.1 At the hearing of the matter the Court allowed evidence and **PW1** was **James Nyasulu** the Applicant herein. He

relied on the Affidavit in Support of the Originating Summons as his examination in chief.

6.2 Under cross examination by the 2nd Respondent, he confirmed that he had evidence that the 2nd Respondent got ZMW1, 300.000.00. He further stated that the account at Indo Zambia Bank was in the names of Policy Analysis and evaluation Bureau (PAEB) and not that of the deceased.

6.3 He said that he sued the 2nd Respondent as an intermeddler and the person who withdrew the money despite not being a signatory to the account.

6.4 In further cross examination he said that there was proof that a piece of land was bought for the deceased in Lundazi in the Eastern Province. He further said that the deceased had told his sister and his children that he had bought land at ZMW17, 000.00 in Lundazi, despite the 1st and 2nd Respondents denying the fact.

6.5 He further said that he was aware that UNDP paid three months after the deceased's death and this was when they were trying to pursue the letters of Administration, when

the 1st and 2nd Respondents withdrew the money from the account.

6.6 He said that he was told by the deceased before he died that the contract sum with UNDP was in the range of Three Million Kwacha and the ZMW1, 300.000.00 which was deposited three months after the deceased's death, was the balance after the successful completion of the project and was his personal money.

6.7 In re-examination, he said that he was a signatory to the PAEB Account and that three months after the deceased's death, money was sent to that account and was later withdrawn.

7.0 **CONSIDERATION AND ANALYSIS**

7.1 I have considered the evidence on record and the submissions by Counsel for the Applicant. From evidence on record it is common cause that:

- i) *Applicant is one of the Administrators for the Estate of the late Augustine Mkandawire;*

- ii) The 1st Respondent is the surviving spouse to the deceased;*
- iii) The deceased registered a society under the Registrar of societies known as Policy Analysis and Evaluation Bureau (PAEB);*
- iv) The deceased died intestate and left property;*

7.2 The Applicant asserts that the 1st Respondent is holding on to the estate of the deceased which is subject of distribution.

7.3 On the other hand, the 1st Respondent's argument is that the Applicant is claiming items forming family property which the 1st Respondent is entitled to use.

7.4 As regards the 2nd Respondent, the assertion is that she intermeddled in the estate of the deceased and further that she concealed property bought by the deceased in Lundazi.

7.5 The 2nd Respondent on the other hand denies having intermeddled in the Estate of the deceased.

7.6 It is the Applicants further assertion that the 3rd Respondent intermeddled in the state of the deceased by allowing a withdrawal by the 2nd Respondent when it was well aware of the demise of the deceased.

7.7 My questions for determination are:

- i) *whether or not a society registered under the Registrar of Societies has separate existence from the proprietors or not;*
- ii) *whether or not the Respondents have intermeddled in the Estate of the deceased;*
- iii) *Whether or not the Applicant and the other Administrator should be given access to PAEB account at Indo Zambia Bank as dully appointed Administrators.*

7.8 This Application hinges on **Section 5 of thee Intestate Succession Act Chapter 27 of the Laws of Zambia (ISA)** which states as follows:

5. (1) *Subject to sections eight, nine, ten and eleven the estate of an intestate shall be distributed as follows:*

- (a) *twenty per cent of the estate shall devolve upon the surviving spouse; except that where more than one widow survives the intestate, twenty per cent of the estate shall be distributed among them proportional to the duration of their respective marriages to the deceased, and other factors such as the widow's contribution to the deceased's property may be taken into account when justice so requires;*
- (b) *fifty per cent of the estate shall devolve upon the children in such proportions as are commensurate with a child's age or educational needs or both;*
- (c) *twenty per cent of the estate shall devolve upon the parents of the deceased;*
- (d) *ten per cent of the estate shall devolve upon the dependants, in equal shares:*

Section 10 of the Intestate Succession Act provides as follows:

Notwithstanding section five where the intestate is survived by more than one widow or a child from any of them, then, each widow or her child or both of them shall be entitled-

- (a) absolutely to the homestead property of the intestate; and*
- (b) in equal shares to the common property of the intestate. Devolution of homestead and common property in polygamous marriage*

Section 14 of the Intestate Succession Act further provides that:

Any person who-

- (a) unlawfully deprives any person of the use of-*
 - (i) any part of the property of the deceased to which that person is entitled under this Act; or*
 - (ii) any property shared with the deceased to which this Act applies; or*

(b) otherwise unlawfully interferes with the use by any person of any property referred to in paragraph (a);

shall be guilty of an offence and liable on conviction to a fine not exceeding seven hundred and fifty penalty units or imprisonment not exceeding two years, or both.

7.9 Having perused the record herein, and going by the above outlined legal provisions, the attached letters of administration shows that the Applicant and Evelyn Mkandawire were appointed administrators of the estate of the late Augustine Mkandawire. Section 19 of the intestate succession act outlines the duties of the Administrator as follows;

19. (1) *The duties and powers of an administrator shall be- Duties and powers of administrator*

(a) to pay the debts and funeral expenses of the deceased and pay estate duty if estate duty is payable;

- (b) to effect distribution of the estate in accordance with the rights of the persons interested in the estate under this Act; when required to do so by the court, either on the application of an interested party or on its own motion-*
- (i) to produce on oath in court the full inventory of the estate of the deceased; and*
- (ii) to render to the court an account of the administration of the estate.*

7.10 From the provision above, it is clear that, effecting distribution of the estate in accordance with the rights of person interested in the estate is one of the duties of an administrator. It therefore follows that after their appointment, the Applicant and Evelyn Mkandawire assumed the responsibility of distributing the deceased's estate after taking care of the debts and funeral expenses of the deceased where payable.

7.11 The Applicant contends that when he went to collect items for the estate from the 1st Respondent, he faced resistance. Further that the 1st Responded has converted the truck

making part of the estate to the use of her son who is not even a beneficiary from the mentioned estate.

7.12 The Respondents did not oppose the claim but it would appear from cross examination of the Applicant by the Respondents that indeed there are properties in the custody of the 1st Respondent. The 1st Respondent does not dispute that she is in custody of other properties but that she has the right to use them.

7.13 Having outlined the role of an administrator, in the instant case, it is therefore necessary for the 1st Respondent to avail all the properties acquired by the deceased and the 1st Respondent to the Administrators. Therefrom the Administrators with the guidance of the law shall be able to assess which property is subject of distribution.

7.14 It is further necessary for the Respondents to produce an inventory of all personal property belonging to the deceased that came into their hands. Additionally, connected to the deceased's personal property, there is an assertion from the Applicant that the deceased did state before his death that he had a farm in Lundazi which fact

was disputed by the Respondents. Moreover, there is even a document exhibited as JN4 which was found among the deceased's personal belongings showing that an amount of K17, 000.00 was payable to the 2nd Respondent for the Lundazi farm.

7.15 The onus is now on the 2nd Respondent to convince the Court that the farm was not bought for the deceased as alleged. And that there is equally no evidence that he had said so to his relatives and there is no proof of such a process of the purchase.

7.16 Let me now turn to the issue of PAEB and the amount purported to have been withdrawn by the 2nd Respondent from its account sitting at Indo Zambia Bank. The Applicant alleged that the 2nd Respondent was neither a signatory to the account nor an Administrator for the estate of the deceased and therefore the 2nd Respondent illegally withdrew the said amount.

7.17 In deciding this issue, recourse is taken from the cooperatives and Societies Act. Reference is had to **Section**

33 of the Cooperative Society Act 1998 which provides as follows:

(1) *On the death of a member, a co-operative society may-*

(a) *transfer the shares or other interests of the deceased member to a person nominated in accordance with the rules made in that behalf; and if there is no person so - nominated, to the legal representative of the deceased member; or*

(b) *pay to any nominee or legal representative, as the case may be, a sum, representing the value of such member's share or other interests, as may be provided in the by-laws.*

(2) *A co-operative society shall pay, to the legal representative of that member, all other moneys due to a deceased member from the co-operative society.*

(3) All transfers and payments made by a co-operative society, in accordance with this section, shall be valid and have effect against any demand made upon the co-operative society by any other person.

7.20 It is therefore the position of the law as can be seen from the above provision that on the death of a member of society his apportioning of shares and other interest in the society is governed by the society's by-laws.

7.21 In the instant case PAEB having been registered under the Cooperatives Act, it is clear that it should have its own by laws governing it. This court cannot make a declaration that, just because the deceased was the founder of the society then automatically the personal representatives should take over the management of the accounts owned by PAEB without evidence and understanding of the governing by-laws. The personal representatives are only responsible for the deceased's shares and interest in the society as stipulated by the by-laws.

7.22 As regards the question of how the 2nd Respondent was appointed, none of the parties herein has brought evidence to show what PAEB's position is on appointment of a signatory. No evidence has been produced to demonstrate the procedure of holding meetings by PAEB. I shall therefore not belabor on this especially that no evidence of the by-laws has been provided. To this extent, the Applicant's claim succeeds and it is ordered as follows;

- 1) *That the 1st and 2nd Respondents delivers up the properties, all documents and personal belongings for the deceased including vehicles, title deeds, keys and receipts and all other valuables;*
- 2) *That the 1st and 2nd Respondents renders an account and produce an inventory of all personal property, including, money belonging to the deceased that came into her hands;*
- 3) *That the deceased's entitlement in the society known as Policy Analysis and Evaluation Bureau (PAEB) be transferred to the Applicant*

and the other Administrator of the deceased's estate who should distribute the same according to law;

- 4) The assessment of all documents and personal belongings for the deceased including vehicles, title deeds, keys and receipts and all other valuables in the hands of the 1st and 2nd Respondents and the deceased's entitlement in the society known as Policy Analysis and Evaluation Bureau shall be heard before the Deputy Director;*
- 5) Costs for the applicant.*

8.0 Leave to appeal is granted.

Dated at Lusaka, this 30th April 2024.



**M.M. Bah-Matandala
HIGH COURT JUDGE**

